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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 383

JOHN CUNNINGHAM, *Petitioner*

v.

JOHN F. ENGLISH, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed judgment of the United States District Court for the District of Columbia upholding the validity of a consent order entered in this cause in the trial court on January 31, 1958, and upholding the validity of an order of construction and modification entered by the trial court on February 9, 1959.

OPINION BELOW

The opinion of the court below has not yet been officially reported. A copy of the opinion and judgment are annexed hereto and printed in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 10, 1959 (App. No. 6a). The jurisdiction of this court is invoked pursuant to the provisions of 28 U. S. Code Section 1254(1).

QUESTIONS PRESENTED

1. Whether the consent order entered by the trial court on January 31, 1958, and the order of construction and modification entered by the trial court on February 9, 1959, are void on their face.

2. Whether procedural due process of law was followed by the trial court incident to the entry of the aforesaid judgments.

STATEMENT OF CASE

This is an appeal from an order of construction and Modification (of a consent order) entered by the United States District Court for the District of Columbia on February 9, 1959. (J. App. 280.) In this proceeding appellant also challenged the validity of the original consent order dated January 31, 1958.

The original consent order (J. App. 58) arises out of litigation commenced in September of 1957 by thirteen members of the International Brotherhood of Teamsters "for themselves and for all other members" of the International "similarly situated," seeking judicial relief from what their complaint alleged were

violations of the International's constitution. The basic objective of the complaint, with its subsequent amendments, was to set aside certain of the actions of the 17th Convention of the International Brotherhood of Teamsters and to secure a new convention at which officers of the International would be elected fairly, legally, and democratically through the procedures established by the International's constitution.

After twenty-two days of trial, during which the original parties plaintiff completed presentation of their case to the court but before the defendants put on any evidence in defense, a settlement of the issues raised by the complaint was reached in the form of a Consent order entered by the court on January 31, 1958. (J. App. 58.) By the terms of this consent order the officers elected at the 1957 Convention of the International Brotherhood of Teamsters were allowed to assume office "provisionally", the constitution enacted at that Convention allowed to be "provisionally" effective, and a board of three monitors was appointed to "counsel with" and "recommend" to the Executive Board of the International toward the end of securing for all members of the International Brotherhood of Teamsters: (a) the right to vote periodically for elective officers; (b) the right to honest and advertised elections; (c) the right to fair and uniform qualifications to stand for office; and (d) the right to freedom to express views at local and international meetings.

That the consent order constituted a full compromise, settling and disposing of the litigation commenced by the original plaintiffs is forcefully demonstrated by the various colloquies between counsel for the original parties plaintiff, counsel for the defendants, and the court at the time this order was entered.

In presenting the order to the trial court, counsel for defendants described it as a "disposition of this case" bringing it to an "equitable conclusion." (Tr. 3721, 3722.) In reply, Godfrey P. Schmidt, counsel for the original parties plaintiff (who was then a Monitor) stated:

> "If the Court please, may I say in the first place that I join in everything Mr. Williams has stated to this Court, and my colleagues will after me.
>
> "I have gone over this consent order and the arrangements for settlement of this very important litigation with great attention to every detail, and I think it is as fine a settlement of as difficult a problem as I have ever been confronted with in my life." (Tr. 3734-3735.)

Judge Letts for his part complimented counsel for both sides for "a settlement of these great issues." (Tr. 3738.)

In September of 1958, two of the Monitors filed a "Petition of the Board of Monitors for Construction, Reformation and or Modification of the Consent Order and for Instructions and Orders of Compliance." (J. App. 64.) Subsequently a separate similar petition was filed by Godfrey P. Schmidt, as counsel for appellees. These petitions sought to establish for the Monitors mandatory, as distinguished from recommendatory, powers broad enough to enable them to make sweeping intervention into the internal affairs of the International Union for the purpose of conducting a so-called "housecleaning." In addition, the Board of Monitors sought clarification and a court ruling on the applicability of Rule 23(c) of the Federal Rules of Civil Procedure to the Consent Order. (J. App. 109.)

Following hearings on the petitions aforesaid, Judge Letts on December 11, 1958 entered a Memorandum Opinion (J. App. 164) holding that the Monitors possessed, as prayed for in their petition, comprehensive mandatory powers authorizing them to make sweeping intervention into the internal affairs of the International union for the purpose of conducting a so-called "housecleaning."

The Court on February 9, 1959 entered its Order of Construction and Modification. (J. App. 280.) The order, which was consistent with its prior Memorandum Opinion, drastically changed the concept of the monitorship as originally set forth in the Consent Order and, in addition, modified and amended the Consent Order by deleting therefrom the privilege therein grantd the International of calling a new convention after one year and substituting in lieu thereof a provision making the time for a convention subject to final approval of the Court upon recommendation of the Board of Monitors.

With respect to the applicability of Rule 23(c) of the Federal Rules of Civil Procedure, the Court in its Memorandum Opinion said:

> "The Court is presently of the opinion that the Rule is not applicable for the reason that the consent order is not a *final settlement* of any essential issue. The controlling issue in the case arose from the request of the plaintiffs that the individual defendants herein should not be permitted to assume the duties of the offices to which they had been elected. Such issue has not been determined. By the consent order such officers so elected were permitted to proceed upon the duties of their offices provisionally. Such permission was temporary only and subject to revocation. The Court

views the consent order as *procedural* and within the control of the Court." (Emphasis supplied.)

In the trial court the appellant challenged the validity of the original consent order entered on January 31, 1958, and challenged the validity of the order of construction and modification entered on February 9, 1958, and from an adverse ruling in the trial court and in the Circuit Court of Appeals for the District of Columbia this petition for a writ of certiorari is presented.

REASONS FOR GRANTING THE WRIT

1. The Consent Order Entered by the Trial Court on January 31, 1958, and the Order of Construction and Modification Entered by the Trial Court on February 9, 1959, Are Void on Their Face.

In this case appellant challenges the validity of both of the aforementioned orders. Although this appeal is taken from the judgment entered in the trial court on February 9, 1959 referred to above as the order of construction and modification, said order must not only stand the test as to its validity, but its validity must also be predicated upon the validity of the original consent order dated January 31, 1958.

The original consent order (J. App. 38) and the order of construction and modification (J. App. 280) show on their face that the courts are being thrust into judicial control over a labor union having over 1,500,000 members. If the actions of the trial court are sanctioned by this court, then the precedent is set for the judicial administration of labor unions, corporation, and indeed all the private businesses in this country. The developments under these orders clearly projects the judiciary into an uncharted area for

which, in many respects, there is no precede The precedent being established in this case is of such far reaching effects that the ultimate cannot be comprehended which constitute compelling reasons for this court to take jurisdiction of this controversy. These orders show on their faces that the court does not have the jurisdiction to enter them." Mr. Justice Frankfurter in his written opinion dated August 4, 1959, in *English, et al.* v. *Cunningham, et al.*, involving an application to stay another decree in this proceeding said (page 4):

> "One thing more does need to be said.
>
> "As is recognized by all concerned, judicial supervision of a union with a membership of 1,500,000 and some 800 locals through the agency of a mechanism like the Board of Monitors is an unusual manifestation of equity powers."

Perhaps Mr. Justice Frankfurter had in mind somewhat the position appellant is taking when he referred to the "unusual manifestation of equity powers."

The U. S. Court of Appeals for the District of Columbia in the very first sentence of its opinion (App. 1a) stated:

> "In this appeal, John Cunningham, one of the plaintiffs, in the companion case of English v. Cunningham, decided this day, attacks the decree of February 9, 1959, primarily on the ground that the consent decree of January 31, 1958, upon which the later decree rests, is void."

That is the only reference made to this issue and there is nothing further in the opinion to indicate that the court passed on that issue unless it be by implication.

When these two judgments are considered together it becomes apparent that the courts are being thrust into a wilderness of litigation having to do with the management of the affairs of labor unions, corporations and private businesses in general. The court does not have the jurisdiction to enter and enforce these orders and parties cannot confer jurisdiction by consent. Appellant's counsel at the time the consent order was entered did agree to it, but subsequent developments clearly show this was a mistake.

This appellant wants a fair and honest election and the consent order of January 31, 1958, seemed to assure it in one year. (See paragraph 5, J. App. 62.) A quick glance through the joint appendix surely shows conclusively that such an election is not even in the offing, and illustrates appellant's point that these two consent orders form the foundation for the monitors and the court handling the internal affairs of the International indefinitely; show that the assets of the International are being squandered. There exists chaos and confusion under these orders and the court continues into the wilderness and a very dangerous precedent is established unless this court intervenes.

2. Whether Procedural Due Process of Law Was Followed By the Trial Court Incident to the Entry of the Aforesaid Judgments.

Nowhere in its language does Rule 23(e) except from its purview, as suggested by the court below in its Memorandum Opinion, provisional compromises, temporary compromises, or interlocutory compromises. The rule applies to all compromises alike, whether provisional, interlocutory, temporary, or final.

In view of this, the statements of counsel for both appellees and appellants, as well as the statements of the court below characterizing the Consent Order as a settlement, themselves dispose of the contention that the Consent Order is not subject to the provisions of Rule 23(e).

The word "compromise" is not a term of limited meaning and has been broadly defined as any arrangement between litigants for settling issues by mutual concessions. 8 WORDS AND PHRASES, 311. BLACK'S LAW DICTIONARY, 4th Ed., at page 359, defines the word "compromise" as follows:

> "An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together . . . A settlement of differences by mutual concessions or an adjustment of matters in dispute by mutual concessions . . . "

The term "settlement," which the Court and counsel for appellees and appellants used to characterize the Consent Order, thus describes a compromise. That the Consent Order was a compromise is indisputable. It was an arrangement between the original plaintiffs and the International Brotherhood of Teamsters, determining the litigious issues raised by the complaint and its amendments. Prior to the Consent Order, all rights of the parties to the litigation were determinable as a justiciable controversy by the Court; after entry of the Order, however, all rights of the parties to the litigation were determinable only by reference to the four corners of the Consent Order itself.

An important consideration in determining whether or not a step taken in class litigation constitutes a "compromise" within the meaning of Rule 23(c) is its effect on other members of the class. *Malcolm* v. *Cities Service Co.*, 2 F.R.D. 405 (D.C. Del., 1942); *Piccard* v. *Sperry Corp.*, 36 F. Supp. 1106 (S.D. N.Y., 1941), affirmed 120 F. 2d 328 (C.A. 2, 1941). The doctrine of res judicata applies to true class actions. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 41 S. Ct. 338 (1921); 3 MOORE'S FEDERAL PRACTICE, 2d Ed., 3470-3472. Applying that doctrine to the instant proceeding, it would appear that after entry of the Consent Order provisionally installing the officers of the defendant International, no member of the International Brotherhood of Teamsters could question the legality of the election of officers at the 17th Convention except in accord with the express or implied terms of the Consent Order itself. Yet the basic objective of the complaint as filed was to set aside the election of officers at the 17th Convention and to secure a new election of officers through the democratic procedures provided by the International constitution. The Consent Order therefore drastically affected the rights of the appellant and other members of the International Brotherhood of Teamsters similarly situated by foreclosing their ability to seek the relief prayed for in the complaint and to challenge the legality of the elections aforesaid. Under the Consent Order there is no immediate prospect of a new convention or election, and there exists a clear danger that the procedures established through the Consent Order could exist for so long a period of time as to cause irreparable injury to the International and its constituent bodies which the Consent Order was ostensibly designed to protect. Examined, therefore, in the

context of its effect upon appellant and other members of the International similarly situated, as well as in the context of the meaning of the term "compromise" as construed by the foregoing authorities, the Consent Order is certainly a compromise.

Curiously, and very significantly, the Trial Court in its Memorandum Opinion (J. App. 175) concluded that the Consent Order was not a compromise within the meaning of Rule 23(e) because it was "procedural and within the control of the Court." Rule 23(e) of the Federal Rules of Civil Procedure, it must be noted, is a rule of procedure, and the Court's conclusion therefore, in this respect, defies analysis.

Notice to all members of a class who will be bound by a proposed compromise is a mandatory condition precedent to court approval under Rule 23(e) of the Federal Rules of Civil Procedure. *Cross* v. *Oneida Paper Products Co.*, 117 F. Supp. 919 (D.C. N.J. 1954); see also *Horenden* v. *Chandler*, 8 Fed. Rules Serv. 23c.1, Case 3, page 517 (D.C. Okla., 1945). The requirement of notice is an expression of public policy designed to protect members of a class who are not actually before the court against unjust and unfair settlements. It has been held, therefore, that any compromise or dismissal of a class action entered without notice to the members of the class bound by the action will not be given the effect of res judicata. *Winkelman* v. *General Motors Corp.*, 39 F. Supp. 826 (S.D. N.Y., 1940). See also *Robertson* v. *Limestone Mfg. Co.*, 20 F.R.D. 365 (W.D. S.C., 1957); *Cohen* v. *Young*, 127 F.2d 721 (C.A. 6, 1942); *Birnbaum* v. *Birrell*, 17 F.R.D. 409 (S.D. N.Y., 1955).

Under Rule 23(e) the notice required is of a "proposed" dismissal or compromise, and it is therefore

clear that such notice must be given before, and not after, entry of a dismissal or compromise. Because of this, it cannot be argued that any notice of the Consent Order, or its terms, published in "THE INTERNATIONAL TEAMSTER" subsequent to entry of the Consent Order "cured" the invalidity of the Consent Order which had been entered without the notice required by Rule 23(e) of the Federal Rules of Civil Procedure.

Failure to follow a "mandatory" statutory provision renders the proceeding to which it relates illegal and void. *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871); *Escoe* v. *Zerbst*, 295 U.S. 490, 55 S.Ct. 818 (1935); 50 Am. Jur., STATUTES, Section 20, pp. 43-44, and cases cited therein.

Even where the parties were personally before the court it has been held that the failure to comply with the requirements of Rule 55(b)(2) of the Federal Rules of Civil Procedure (requiring that three days' notice be given of a hearing on an application for a default judgment) results in a denial of due process, rendering the judgment entered void. *Bass* v. *Hoagland*, 172 F.2d 205 (C.A. 5, 1949), cert. denied 338 U.S. 816, 70 S.Ct. 57 (1949); *Ken-Mar Airport, Inc.* v. *Toth Aircraft & Accessories*, 12 F.R.D. 399 (W.D. Mo., 1952). Rule 23(e) deals with a far more sensitive situation than does Rule 55(b)(2) since, in the latter instance, the party affected is himself before the court and has the full opportunity to protect his own interests.

In the present case, substantial rights of appellant and other members of the International Brotherhood of Teamsters have been adversely affected (as members of a class) by the Consent Order even though they were not before the Court and were never given notice

of their right to object to entry of such Consent Order. Because the courts appear unanimous in holding that the notice requirement of Rule 23(c) is mandatory, it is submitted that the Consent Order is illegal and void ab initio, because the provisions of that rule were not observed by the court below or the parties in entering the Consent Order.

A judgment which is void in the first instance cannot serve as a basis for maintenance of an action thereon. *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 35 S.Ct. 37 (1914); *Wetmore v. Karrick*, 205 U.S. 141, 27 S.Ct. 434 (1907). Such a judgment has no legal effect, binding force, or efficacy for any purpose. It cannot affect, impair, or create rights, and it may be attacked at any time. A void judgment is therefore a nullity, and the general rule is that a void judgment cannot be cured by subsequent proceedings. 30A Am. Jur., JUDGMENTS, Sections 45 and 46. By analogy, an order such as the Consent Order cannot be made to serve as a valid basis for a subsequent order such as the Order of Construction and Modification, nor can the invalidity of the prior Consent Order be cured by a subsequent Order of Construction and Modification.

That regardless of the construction placed upon the original consent order and the subsequent order of modification and construction the net result is an initial and continuing depredation on the vested interests of the funds and assets in the International treasury, which are the funds of the rank and file. This is recognized by the Court of Appeals opinion where it provided for notice before payment of counsel fees. Appellant, in this respect, cannot distinguish between counsel fees and compensation of the Monitors as the Court of Appeals asserts in a footnote to its opinion.

After all, the rank and file are the ones that foot the bills.

The invalidity of the Consent Order has been fully demonstrated hereinabove. To allow it to serve as the basis for a valid order of modification or, in the alternative, to allow the Order of Modification to cure its basic invalidity would derogate from the fundamental tenets of due process which the Fifth Amendment to the Constitution of the United States secures.

CONCLUSION

Appellant demonstrates clearly that the two judgments are beyond the cognizance of equity jurisprudence; that dangerous precedents have been established thus far casting the courts in the role of administrator of the internal affairs of a large labor union; having monitors operate and manage their affairs instead of duly elected officers, that rank and file members are denied due process of law and their assets squandered; denied an honest prompt election and, indeed, their existence as a union is grayely threatened.

WHEREFORE, Petitioner prays that the writ be granted.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15033

JOHN CUNNINGHAM, APPELLANT

v.

JOHN F. ENGLISH, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided June 10, 1959

Messrs. Raymond R. Dickey, and *Joseph M. Williamson*, of the bar of the Supreme Court of Illinois, *Pro hac vice*, by special leave of court, for appellant. *Mr. Robert Rolnick* also entered an appearance for appellant.

Mr. Edward Bennett Williams for appellees. *Mr. Raymond W. Bergan* also entered an appearance for appellees.

Mr. Thomas X. Dunn for Board of Monitors. *Mr. Martin F. O'Donoghue* was on the brief for Board of Monitors.

Before EDGERTON, WILBUR K. MILLER and FAHY, *Circuit Judges*.

FAHY, *Circuit Judge:* In this appeal, John Cunningham, one of the plaintiffs in the companion case of *English v. Cunningham*, decided this day, attacks the decree of February 9, 1959, primarily on the ground that the

consent decree of January 31, 1958, upon which the later decree rests, is void. The contention is that the District Court did not have jurisdiction to approve the consent decree without first giving notice to all persons who were to be bound. This result is said to be required by Rule 23 of the Fed. R. Civ. P. A contention is also made that failure to give notice led to a denial of due process.

Rule 23, in pertinent part set forth in the margin,[1] provides that "A class action shall not be dismissed or compromised without approval of the court," and that when the right sought to be enforced for the class is joint or common "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[1] Rule 23:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

. . . .

"(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

It seems clear enough that the rights sought to be enforced by the plaintiffs in the companion case are joint or common with the rights of members of the Teamsters and its subsidiary bodies, see *Underwood* v. *Maloney*, 14 F.R.D. 22 (E.D. Pa. 1953), thus classifying the rights as within section (a) (1) of the Rule. Furthermore, notice of the proposed consent decree was not given to all members of the class until after it had been entered. We agree with District Judge Letts, however, that notice was not required under the Rule since the decree was not a dismissal or compromise of the action within the meaning of section (c) of the Rule. That the consent decree was not a dismissal goes without saying. And we think it not such a compromise as required advance notice. The Rule applies only to a final disposition of an action, either by dismissal or by compromise. It does not apply even to a final disposition by adjudication.

As Judge Letts said, the consent decree "is not a final settlement of the essential issue but is interlocutory in nature." It embodied a plan, and terms for carrying it out, which required a large measure of future conduct by the parties, leading toward an ultimate disposition of the litigation by the court itself.

The rule makers had in mind something quite different, primarily stockholders' derivative actions, where a stockholder-plaintiff might "sell out" other stockholders by disposing of the action by dismissal or compromise. See notes of the Advisory Committee on the Rules where reference is had to *McLaughlin, Capacity of Plaintiff-stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421 (1937). As the author states at 430:

> To allow a single stockholder or group of stockholders the power to make a private compromise of the corporate cause of action places a heavy reliance upon their judgment (assuming its exercise in good faith), and leaves the corporate claim (and the in-

> direct rights of non-joining stockholders) at the mercy of individuals who have no hope of personal recovery even if the suit is prosecuted successfully . . . . [O]bviously a wide door is opened to strike suits and collusive payments to stockholders which may rarely, if ever, be recovered by the corporation.

See, also, *Winkelman* v. *General Motors Corp.*, 39 F. Supp. 826, 831 (S.D.N.Y. 1940); *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, 178 (S.D.N.Y. 1945); 3 *Moore, Federal Practice*, par. 23.24, at 3549 (2d ed. 1948); 2 *Barron and Holtzoff, Federal Practice and Procedure* § 570, at 185 (Rules ed. 1950).

While the Rule must be given a fair application consistent with its language even if its framers had in mind something more limited, it is not to be given an application inconsistent with its purpose. No one has been closed out of the present litigation by a dismissal or compromise. The litigation continues. No member of the class has been barred from access to the court.

Paragraph 14 of the consent decree obligates the Teamsters to pay the fees of counsel for plaintiffs, the amount being subject to the approval of the District Court. We think this provision is severable from the remainder of the consent decree. Notice should have been given to the membership before approval by a court of equity of this obligation upon union funds, even if not required by Rule 23.[2] The amount of fees approved by the District Court is in dispute in litigation pending in this court, No. 14733, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Thomas J. Dodd, et al.* The fees accordingly have not been paid. The solution, therefore, is to suspend this provision of

[2] Out-of-pocket expenses of litigation, and the compensation of the Monitors, which the Teamsters must also pay, we think are not in the same category as counsel fees.

paragraph 14 of the consent decree and to direct the District Court to (1) give notice with respect to it and (2) reconsider the provision in the light of the result of the notice.

The claim of violation of due process by reason of the absence of notice must also be denied for the same reasons which preclude the necessity of notice under the Rule.

The remaining contentions of appellant need not be discussed except as they are considered in the companion case of *English* v. *Cunningham*.

Affirmed except as the decree on appeal is modified in the companion case decided this day.

WILBUR K. MILLER, *Circuit Judge*, concurring in part and dissenting in part: I dissent from the paragraph of the majority opinion which deals with Paragraph 14 of the consent decree. That Paragraph obligates the Teamsters to pay the plaintiffs' counsel fees, the amount being subject to the approval of this District Court. The amount allowed is now on appeal to us in case No. 14,733 and, I think, should be disposed of there.

Although conceding that the giving of notice concerning Paragraph 14 to the membership of the Teamsters union is not "strictly required" by Rule 23, the majority say notice should nevertheless be given. They suspend this provision of Paragraph 14 "to await the outcome of the notice." I see no reason to require that notice be given, or to suspend the provision.

Otherwise I concur in Judge Fahy's opinion.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of February 9, 1959, appealed from in this case is affirmed, except as the consent decree of January 31, 1958, is modified in No. 14,983, *English* v. *Cunningham*, decided this day.

It is Further Ordered by the court that appellees recover from appellant their taxable costs on this appeal and have execution therefor, and that the cost of the mimeographed brief of the Monitors shall be paid by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Per Circuit Judge Fahy.

Dated: June 10, 1959

Separate opinion by Circuit Judge Wilbur K. Miller concurring in part and dissenting in part.

Order

Upon consideration of appellant's motion to consolidate this appeal with the appeal in case No. 14,983, and counsel for appellee, John F. English, having orally informed the Clerk's office that he has no objections, and it appearing that appellee, Martin F. O'Donoghue, Chairman of the Board of Monitors has filed an opposition to the motion to consolidate, it is

ORDERED that the motion to consolidate is denied but that the parties in case No. 15,033 may refer to the joint appendix in case No. 14,983 in lieu of reproducting that joint appendix in this case.

It is FURTHER ORDERED pursuant to Rule 32(c), that the time for filing briefs and the joint appendix is reduced as follows:

> Appellant's brief shall be filed by April 3; Appellees' briefs shall be filed by April 14 and the joint appendix shall be filed by April 14. Briefs and the joint appendix may be filed in mimeographed form.

It is FURTHER ORDERED that this case is set for oral argument on April 15, 1959 following the argument in case No. 14,983.

Dated: April 2, 1959

Per Curiam.

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FILED
OCT 9 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 383

JOHN CUNNINGHAM, *Petitioner*

v.

JOHN F. ENGLISH, et al., *Respondents*

MEMORANDUM FOR RESPONDENTS ENGLISH, ET AL. CONCERNING THE PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 383

JOHN CUNNINGHAM, *Petitioner*

v.

JOHN F. ENGLISH, et al., *Respondents*

MEMORANDUM FOR RESPONDENTS ENGLISH, ET AL.[1] CONCERNING THE PETITION FOR CERTIORARI

The respondents English *et al.* do not oppose the granting of the petition for certiorari. These respondents believe that the Court of Appeals correctly concluded that no violation of Rule 23(*c*), F.R. Civ. P., was involved in the entry of the consent decree of January 31, 1958. Indeed, they argued below for

[1] The petitioner names as respondents the persons who were defendants in the District Court and the persons other than himself, who were plaintiffs in that court. The designation "English *et al.*" is here employed to refer to those respondents who were defendants in the District Court.

that conclusion. The Court of Appeals appears, however, to have rejected or not to have considered the grounds for the conclusion which were advanced by respondents and to have based the conclusion, instead, upon a theory that Rule 23(c) does not apply to all compromises and that the compromise embodied in the consent decree was not one to which the Rule applies. Respondents believe that the theory employed by the court below is erroneous and, if followed in other cases, will greatly weaken the Rule and produce unjust results. It is submitted, therefore, that this Court should grant the petition for certiorari for the purpose of correctly stating the law.

These respondents defended the consent decree in the Court of Appeals[2] on the grounds that:

1. The class action, as designated in the complaint, was not within Rule 23 (a) (1).[3]

2. Assuming the action was a class action within Rule 23 (a) (1), petitioner had no standing to attack the entry of the consent decree under Rule 23(c), because, having participated in the compromise as one of the parties representing the plaintiff class and having, as such, agreed to the adoption and entry of the consent decree, he could not be heard to complain of lack of notice.[4]

3. Assuming petitioner had standing to raise the question and assuming further that the plaintiffs' suit

[2] See the present respondents' petition for certiorari in *English et al. v. Cunningham et al.*, No. 415, at pages 34, n. 15. See also respondents' brief in the court below, reprinted in the appendix hereto.

[3] See Appendix, p. 5a.

[4] *Id.* at 1a-2a.

was a true class action under Rule 23 (a) (1) to which the notice requirement of subsection (c) applies, the Rule was complied with by notice given to the members of the class after entry of the decree, because, in this case,

> "(1) . . . the process of giving notice [would have been] unusually time-consuming; (2) . . . by the nature of the compromise, there [was] a need for immediate commencement of planning and preparation to effectuate the compromise; and (3) . . . no prejudice to any member of the class [had] resulted from the giving of notice after rather than before entry of the order."[5]

4. Assuming prior notice was required, the consent decree entered without prior notice to the members of the class was not null and void so as to be subject to collateral attack at any time, but only voidable by timely direct attack. The members of the class, therefore, having had post-decree notice in ample time to object before completion of the preparatory stages and before the accrual of substantial expenses and having refrained from any objection for almost a year, were barred by laches from making a collateral attack on the entry of the decree.[6]

The Court of Appeals concluded that the action was a class action within Rule 23(a) (1). It remained silent, however, on all of respondents' other contentions. It sustained the consent decree on the ground that it was "not such a compromise as required advance notice. The Rule applies only to a final disposition of an action, either by dismissal or compromise."[7]

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[5] *Id.* at 7a.

[6] *Id.* at 8a-10a.

[7] Petition for certiorari herein, Appendix, p. 3a.

The factor distinguishing this compromise from those which would require notice to members of the represented class was, according to the Court of Appeals, that this compromise merely "embodied a plan, and terms for carrying it out, which required a large measure of future conduct by the parties, leading toward an ultimate disposition of the litigation by the court itself."[8]

The members of the plaintiff class had sued (1) to prevent the installation in office of the respondent officers of the International Brotherhood of Teamsters and the effectuation of the construction adopted at the International's 1957 convention, and (2) to obtain a new convention and election under a certain degree of judicial supervision. Their suit was founded upon allegations that respondents English *et al.* had "rigged" the 1957 convention. As a result of the compromise, the challenged officers were installed and the challenged constitution effectuated, albeit provisionally, and the call for a new convention was postponed, possibly until 1962. Furthermore, the issues of fact raised by the allegations of the complaint were all obviated by the compromise. Even if the Court of Appeals were correct in saying that there is yet to be an "ultimate disposition of the litigation by the court itself" (a proposition with which respondents disagree),[9] it is undeniable that, if members of the plaintiff class were to appear in the trial court and attempt to offer evidence in support of the allegations of the complaint and demand the relief sought by the complaint, their proffer of evidence and demand for relief

[8] *Ibid.*

[9] See Petition for Certiorari in No. 415, at 33-35.

would be rejected. They would be told that the original issues of fact had been disposed of by entry of the consent decree and that the only relief they could obtain was that provided by the decree, not that demanded by the complaint. In short, the consent decree determined their cause. That there might later be issues among the parties as to interpretation of the consent decree and as to possible violations of the decree does not make any the less final the disposition of the issues raised by the complaint. The fact that, as a result of the monitorship created by the consent decree and the operation of the provisional administration installed under that decree, the membership of the International may ultimately have an organization which a district judge thinks is better than the one they challenged and even better than what they sought in their complaint, does not make the decree any the less a determination that they will not receive the relief for which they had sued. Whatever the members of the plaintiff class may obtain through what the lower court calls the "ultimate disposition of the litigation by the court itself", it is clear beyond peradventure that their right to obtain the relief they asked for in the complaint is irretrievably gone.

Under the holding below, the parties representing a class in a suit under Rule 23 (a) (1) may, without notice to the members of the class, bind them to a compromise depriving them irretrievably of their right to obtain the relief sued for, so long as, under the terms of the compromise, there is future action to be taken by the parties and the court. This holding seems palpably erroneous. It is submitted, moreover, that this holding is not so narrowly related to the facts of the instant case as to be inapplicable to other cases

brought under Rule 23 (a) (1). Indeed, it would seem applicable to the usual run of stockholder suits. Consider, for example, the type of case in which a group of preferred stockholders sues on behalf of all other preferred stockholders for a declaration that, because a dividend has been passed, the preferred stock has exclusive voting rights. The nominal plaintiffs may be persuaded to compromise the case on the basis that voting rights remain in the common stock but that the officers and directors of the corporation undertake, under judicial supervision, to make certain administrative reforms which will make more likely the declaration of future dividends. Such a case would be in all pertinent respects like the instant case. Under the holding below, such a compromise, though disposing of the rights of the members of the class, would be effective even though they had been given no prior notice and no chance to object.

CONCLUSION

Although respondents still believe, as they argued below, that the consent decree is immune to petitioner's attack, it is their position that the ground upon which the court below reached that conclusion—in effect, that the compromise was not really a compromise—is untenable. They believe, further, that the decision below, if permitted to stand, will do violence to the spirit and purpose of Rule 23(c) in many future cases. They urge this Court, therefore, to grant the petition for a writ of certiorari, vacate the judgment below, and remand the cause to the Court of Appeals for further proceedings.

Respectfully submitted.

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,033

JOHN CUNNINGHAM, *Plaintiff Below*

v.

JOHN F. ENGLISH, *et al., Defendants Below*

On Appeal from An Order of the United States District Court for the District of Columbia

BRIEF OF DEFENDANTS BELOW

This is a related appeal to that in No. 14,983. John Cunningham, who was one of the plaintiffs below and is, therefore, an appellee in No. 14,983, has seen fit to appeal herein from the order of the District Court of February 9, 1959, seeking the same relief as is sought by the appellants in No. 14,983, namely, a reversal of the said order of the District Court. In his brief herein, Mr. Cunningham designates the defendants below as "appellees", but calls them "appellants". To avoid confusion, we shall refer to the defendants below in this brief as "defendants" and to Mr. Cunningham by his name.

To the extent that Mr. Cunningham, as indicated by the conclusion of his brief, seeks reversal of the order of February 9, 1959, defendants agree with him. But he also argues in his brief, even if he does not request it by way of conclusion, that the consent order which was construed and modified by the order under attack should itself be held "null, void ab initio, and of no force or effect." With the latter contention, defendants cannot agree. They undertake, therefore, to answer it herein.

A short and dispositive answer to Mr. Cunningham's contention, which is based on a reading of Rule 23 (e), F.R. Civ. P., as making the consent order a nullity be-

cause of failure to give prior notice to members of the plaintiff class, is that Mr. Cunningham has no standing to make it. He was, as has been noted, one of the parties representing the plaintiff class. As such, he was before the District Court when the consent order was adopted and entered and agreed to such adoption and entry. If notice was required to be given to members of the represented class prior to entry of the order, it was certainly not required to be given to the representing parties who were in court and had actual knowledge of it. Mr. Cunningham cannot claim any prejudice to himself from any failure to give a formal notice to others of that which he himself knew through actual participation.

Since the attack upon the consent order which Mr. Cunningham presses in this appeal is also sought to be made by would-be intervenors in No. 14,983, we shall show herein that, the consent order is valid even if attacked by members of the represented class rather than by a representing party who had actual notice of it.

As a background for discussion of the effect of Rule 23 (c), F.R. Civ. P., we think the Court should consider the consequences of vacating the consent order of January 31, 1958. The order, as we have shown in our brief in No. 14,983, represented the best efforts of counsel on both sides to produce a mutually satisfactory solution to a problem of great complexity. So far as the efficient administration of the courts is concerned, a matter which must necessarily loom large in this Court's consideration, the order had the double virtues of (1) dispensing with the necessity of going on with a trial in which the presentation of the plaintiffs' case alone had already taken twenty-two days and (2) avoiding the necessity of judicial involvement in the details of the internal affairs of a great trade union.

In the period of more than a year during which the Union has been operating under the consent order, as we have further shown in our brief in No. 14,983, great and

significant strides have been made toward assuring that any new convention of the Union would be a true reflection of the members' interests and desires, if indeed any question existed that the last convention was not such a true reflection. Moreover, there is every reason to expect and no reason to doubt that, if this Court reverses the order of February 9, 1959, and reinstates the consent order to its original character as an instrument for cooperative examination of specified areas of Union affairs, further great strides can speedily be made and a new convention held without substantial delay. For example, the Union's program of restoring trusteed locals to autonomy, interrupted by the Monitors, can undoubtedly be quickly completed to the satisfaction of all concerned. The defendants feel absolutely assured that the regularity and propriety of the new convention will be immune to any successful attack by the plaintiffs below or by any other member of the Union. That assurance is felt, moreover, notwithstanding the fact that the Monitors, one of whom is plaintiffs' counsel, have for more than a year, had free access to information about every conceivable aspect of the Union's operations.

If the consent order were now to be vacated, the trial, which has already taken twenty-two days and the issues in which have largely grown stale by reason of the progress made under the consent order, would have to be resumed. How long it would take to present defendants' case is very difficult to estimate, but, in view of the multiplicity of charges and aspersions contained in the complaint and the shot-gun nature of the evidence the plaintiffs were permitted to introduce, it can safely be said that defendants' evidence would take far more than twenty-two days.

And what would be the consequence if the defendants lost after weeks of trial? The 1957 convention would be held to have been illegal and a new convention would be ordered. But since a new convention can sooner be held without completing the trial than by completing it, to vacate the

consent order and resume the trial would seem to be a course serving no purpose at all. The only advantage to the plaintiffs from such a course could be said to be that the court might establish a preconvention receivership or mastership, as requested by the complaint, to see to the establishment of fair election procedures. But a proper completion of the Monitorship under the terms of the consent order will assure a speedier accomplishment of that result as well. Furthermore, since the necessity for such a receivership or mastership must be determined in the light of present circumstances, not those that existed when the complaint was filed, and since very substantial progress has been made in the past fourteen months under the consent order, it is extremely unlikely that these extraordinary equitable remedies would be found justified.

Another consequence of vacating the consent order might be to cast in question the authority of the Union's officers and General Executive Board to occupy their offices, the ultimate issue which was settled by the consent order. Preparatory to adoption of the compromise, the District Court, on January 23, 1958, had entered an order dissolving the preliminary injunction of October 23, 1957, which had prohibited the installation in office of the persons elected at the 1957 convention. J. A. 56. If the order of January 23, 1958, were dissolved along with the consent order, the Union would be left without any central authority. Would the District Court then reach back and reinstate Dave Beck? If not, would the court itself take the unprecedented step of undertaking to govern the ramified affairs of a Union of 1,600,000 members?

It seems to us, in view of the foregoing, that vacating the consent order would be an act of pure mischief, helping none of the parties, hurting all, and appealing to neither reason nor equity. What is it, then, that Mr. Cunningham or the intervenors in No. 14,983 think should impel the Court to such a senseless course? The sum and sub-

stance of their position is that the suit was a true class suit and that Rule 23 (c), F.R. Civ. P., must be given an inflexible construction whereby a consent order entered in such a suit without *prior* notice to the members of the class is *necessarily* a nullity, despite subsequent notice to all members and ample opportunity for timely remonstration.

The plaintiffs describe the suit in paragraph 19 of the complaint as a class suit under subdivisions 2 and 3 of Rule 23 (a), rather than subdivision 1. J.A. 3. If that designation is correct,[1] Rule 23 (c) imposes no requirement of notice to the members of the class prior to entry of the consent order.

The District Court, when the Rule 23 (c) issue was raised by the Monitors, held the rule inapplicable because the consent order did not constitute a "final settlement of any essential issue." J.A. 175.

If, notwithstanding the view of the plaintiffs as to the nature of their suit and the view of the District Court as to the nature of the consent order, Rule 23 (c)'s notice requirement was applicable here, the question before this Court is whether the rule must be given the inflexible construction advanced by Mr. Cunningham and the intervenors or, on the other hand, may and should be read as elastic enough to accomplish equity as the circumstances of each case require.

In the instant case notice of the compromise was not given to the 1,600,000 members of the Union in advance of the entry of the consent order on January 31, 1958. Notice was thereafter given, however, by publication in the next issue of the Union's magazine, circulated to the membership about the first week of March, 1958, of a statement by the Board of Monitors dated February 19, 1958. Defend-

[1] But see *System Federation No. 91* v. *Reed*, 180 F. 2d 991, 996-98 (6th Cir. 1950).

ant's Exh. No. 20, at 53-56. In the interim, little more was undertaken than preliminary discussions among the Monitors and between the Board of Monitors and the Union looking toward the establishment of the administrative machinery for effectuation of the consent order. All the members of the Union had notice of the compromise in ample time to intervene in the District Court to oppose it before there had been any substantial commitment of the rights or the funds of the Union or its members. No member of the Union, however, either intervened for that purpose or even informally demurred to the compromise. Not until January, 1959, after the District Court had rendered its Memorandum Opinion construing the consent order as giving the Monitors mandatory authority, did Mr. Cunningham or the intervenors undertake to challenge the entry of the consent order.

It is the defendants' thesis that Rule 23 (e), if applicable, should be construed to leave it within sound judicial discretion to validate a consent order, notice of which was given to members of the class *after* rather than *before* entry of the order, where it appears that (1) prior notice might unduly have delayed matters, to the substantial prejudice of the interests of all parties, and (2) the post-entry notice provided ample opportunity, if diligently pursued, for any dissident member of the class to protect any asserted right. The policy of the rule is satisfied if, as here, (1) the compromise device is so complex as to require considerable time for planning and preparation and it is imperative that the control and administration of the Union be regularized and the constitutional rights of the members be profected as speedily as possible, and (2) the members of the class, before completion of the planning and preparation stage, albeit not before entry of the order, receive notice of the compromise and have an opportunity to raise any objections they may have. Justice does not require, in such a case, that the order be treated as a nullity simply because the notice is given after rather than before

entry of the order. It is altogether consonant with justice and with the policy of the rule to hold the order valid in such a case if dissident members, having received notice, disregard their obligation to file their objections without unreasonable delay. Neither justice nor the policy of the rule permits a member of the class who has received post-entry notice to accept the compromise by silence and then, many months later, seek to renounce it.

Ordinarily, of course, a court will not validate an order entered without prior notice, for it is the rare case that presents the combination of factors justifying validation of an order so entered: (1) that the process of giving notice is unusually time-consuming; (2) that, by the nature of the compromise, there is a need for immediate commencement of planning and preparation to effectuate the compromise; and (3) that no prejudice to any member of the class has resulted from the giving of notice after rather than before entry of the order. We submit, however, that the rare case is often also the important case, so that the rule should be construed, if possible, to permit such cases to be dealt with without offending justice and equity.

Rule 23 (e), we submit, can and should be so construed.

In the first place, we are aware of no holding by any court that the rule *requires* an order entered without prior notice to be treated as a nullity. The question seems never to have been raised, so that the instant case is, in that respect, a case of first impression.

Mr. Cunningham and the intervenors point out that the rule requires "notice of the *proposed* dismissal or compromise" to be given. Even if the word "proposed" be held to modify "compromise" as well as "dismissal", it does not follow, that, if the order embodying the compromise is entered before the notice is given, the order is "null, void ab initio, and of no force and effect."

The parties attacking the consent order fail to distinguish between errors going to the jurisdiction of the court or to due process and those which merely constitute irregularities. The former have traditionally been held to make a judgment absolutely void, so that it may be collaterally attacked at any time; the latter make the judgment only voidable, so as to be assailable only directly and only if the party aggrieved proceeds without undue delay. *Christianson* v. *King County*, 239 U.S. 356 (1915); *Simmons* v. *Saul*, 138 U.S. 439 (1891); *Parker Bros.* v. *Fagan*, 68 F. 2d. 616 (5th Cir.), *cert. denied*, 292 U.S. 638 (1934); Freeman, *Judgments* §§ 321, 322, 337, 339 (5th ed. 1925); Note, 59 Yale L.J. 345 (1950). As Freeman says at § 322, p. 645:

> "The law provides adequate remedies for obtaining direct relief from erroneous or irregular [i.e. voidable] decisions. It is not the policy of the law to permit a party to such judgments to stand idly by without availing himself of the opportunity given him to repair the mistakes and missteps of a court acting within its jurisdiction although in an erroneous manner and to reserve his objections for litigation in a collateral proceeding."

As the Yale Law Journal puts it, to attack a voidable judgment, "the aggrieved party must either have prosecuted his claim promptly or have thoroughly justified his delay." 59 Yale L. J. at 345.

The alleged violation of Rule 23(c) relied upon by Mr. Cunningham and the intervenors does not amount to a denial of due process. As Mr. Justice Brandeis wrote for the Supreme Court in *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 158 (1932):

> "Due process requires that there be a reasonable opportunity to present every available defense; but it need not be before the entry of judgment."

The District Court's jurisdiction over the subject-matter of the suit has never been challenged.

Nor can it be seriously contended that the District Court lacked jurisdiction over the persons involved.

The court clearly had jurisdiction over the entire class represented in the action, for, if the action was a true class suit, as Mr. Cunningham and the intervenors must say it was in order to invoke the notice requirement of Rule 23 (c), a decree of the court would bind the entire class;[2] and this would be so even if the court, without notice to the members of the class, entered an involuntary dismissal of the suit. *Hutchinson* v. *Fidelity Ins. Ass'n.*, 106 F. 2d 431 (4th Cir. 1939).

The consent order entered by the District Court on January 31, 1958, assuming it was erroneously entered, was, therefore, no more "void" than an order which is against the weight of the evidence or one which is in improper form or one where the person affected is an incompetent.

In the latter connection, the Court of Appeals for the Tenth Circuit said in *Fernow* v. *Grubser*, 136 F. 2d 971, 973 (1943):

> "The mere incompetency of a person does not prevent a court from acquiring jurisdiction of his person or authority to adjudicate his property rights. In Oklahoma, a judgment against an incompetent person not represented by a guardian is not void, but voidable. Blair v. Blair, 124 Okl. 128, 254 p. 38."

Similarly, in this jurisdiction, the late Judge Laws said in *In re Edward B. McLean*, 67 W.L.R. 251, 256 (1939), affirmed, 71 App. D.C. 107, 107 F. 2d 665 (1939), a case involving a six-year old committeeship over an incompetent:

> "The fact that notice in the beginning was not given MacLean would not render the proceedings void. Such failure was merely an irregularity which would render the appointment voidable and after the notice

[2] *Supra* note 1.

which now has been given McLean [six years later] it is possible for this court to ratify and continue the appointment. *Coleman* v. *Schwartz*, 50 App. D.C. 111, 48 Washington Law Rep. 790."

The instant case is not unlike the case of entry of a default judgment without the prior notice required by Rule 55 (b) (2), F.R. Civ. P. Where such an error occurs, it is merely "a procedural error in disregarding the rule" and, if not attacked by a timely appeal from the judgment, is immune to later collateral attack. *United States* v. *Watkins*, 159 F. 2d 675, 677 (2nd Cir. 1947); see also Note, 59 Yale L.J. 345 at 347 n. 14.

Thus the allegedly erroneous consent order here, if not moved against in time, become absolute and unassailable. *Parker Bros.* v. *Fagan*, 68 F. 2d at 617-18.

How much time any dissident member of the class in the instant case could reasonably have been allowed is a question that need not be determined. It is enough to say here, as we have shown, that having received notice of the consent order in March, 1958, in ample time to object before completion of the planning and preparatory stages of its implementation and before the accrual of substantial expenses, having refrained from making any objection until January of the next year when the Monitorship had almost run its course as defined in the consent order, and having apparently acceded to the consent order as originally entered, discovering their objection only after the District Court had decided to alter the nature of the order, the dissident members of the class are guilty of inexcusable laches. The consent order, therefore, if originally voidable for lateness of notice, has become, as to those members, absolute and unassailable.

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No. 383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JOHN CUNNINGHAM, *Petitioner*

vs.

JOHN F. ENGLISH, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO CORRECT OR AMEND THE TITLE TO DESIGNATE OR CONFIRM THE BOARD OF MONITORS AS A PARTY RESPONDENT, AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MARTIN F. O'DONOGHUE,
Chairman of the Board of Monitors
831 Tower Building
Washington, D. C.

October 8, 1959.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO CORRECT OR AMEND THE TITLE TO DESIGNATE OR CONFIRM THE BOARD OF MONITORS AS A PARTY RESPONDENT

The Board of Monitors, a court-appointed body operating pursuant to a Consent Order entered by the United States District Court for the District of Columbia hereby moves the Court for leave to file a brief in opposition to the petition for certiorari in the above-captioned case and to correct or amend the title so as

to designate or confirm the Board of Monitors as a party respondent therein. As grounds for this motion, the Board states as follows:

I.

On January 31, 1958, the United States District Court for the District of Columbia entered an order to which the defendants (the International Brotherhood of Teamsters and the International officers thereof) and the thirteen plaintiffs in the case, including petitioner Cunningham, had previously consented. This Consent Order established an impartial court-appointed body, the Board of Monitors, to assist in bringing the litigation to a solution consistent with the rights and duties of the parties.[1] Under the Consent Order the Board of Monitors would continue to function for at least one year and until the Teamsters Union held a new convention and the officers duly elected at such convention were installed. The Consent Order also provided that such convention should not be held prior to January 31, 1959.

In exchange for the acceptance of certain substantive obligations, including the establishment of the Monitorship, the defendants in turn were permitted to *provisionally* assume office as officers of the International Union.

II

In the latter part of 1958 there began a continuing refusal of the officials of the Teamsters Union to cooperate in attaining the goals of the Consent Order, which

[1] The Board consists of three court-appointed officers, one nominated by defendants, one nominated by the plaintiffs, and an impartial chairman.

included, among other things, the establishment of free and democratic election processes, proper accounting records and fiduciary standards for those who handle union funds. As a result, little or no progress could be made toward the development of conditions which would give reasonable assurance that new elections in accord with the membership rights under the International Constitution could be effected. Notwithstanding the absence of those conditions and together with further violations of the obligations under the Consent Order under which the Teamster leadership held provisional office, a new convention was called. Accordingly, the Board of Monitors, acting pursuant to its duties under the Consent Order, reported the fact of the defendants' non-compliance to the district court. In its petition, the Board asked the court to require the defendants to comply with certain recommendations issued by the Board directed to obligations assumed by the defendants under the Consent Order. The Board further requested the court to modify the Consent Order so as to extend the one-year limitation on the Monitorship[2] in order to have sufficient time within which to establish rules which would ensure a free and democratic election of officials of the union.

On February 9, 1959, after seven days of trial, the district court granted the petition of the Board of Monitors. The court found, *inter alia*, that the defendants had in bad faith frustrated and thwarted the efforts of the Board in carrying out the provisions and objectives of the Consent Order and directed that no

[2] The judgment of the Court of Appeals now provides that election of officers of the International might be held at any time after February 9, 1960, when the court upon recommendation of the parties shall determine that such convention be held.

international convention of the Teamsters Union should be called until there had in fact been good faith compliance with the terms of the Consent Order by the defendants. From this decision petitioner appealed.

By order of April 2, 1959, in disposing of a preliminary matter relative to the petitioner's appeal, the Court of Appeals expressly recognized Martin F. O'Donoghue, acting as Chairman of the Board of Monitors, as an appellee in the proceedings.[3]

In the Court of Appeals petitioner continued his attack upon the Consent Order to which he was a signatory party. He was opposed by the Board of Monitors, who, participating as an appellee, filed briefs and presented oral argument. The judgment of the Court of Appeals, rejecting petitioner's attack upon the Consent Order, is the judgment here sought to be reviewed.

The defendants in the original action also appealed from the order of February 9, 1959. In that case also, the Board of Monitors, at whose instance the February 9 order was issued, filed briefs and participated fully in oral argument. The court affirmed the order in all significant respects,[4] withholding judgment in order

[3] Order of the United States Court of Appeals for the District of Columbia Circuit dated April 2, 1959, in *Cunningham* v. *English*, No. 15,033; See Pet. 7a.

[4] In its opinion the Court of Appeals interpolated that the Board of Monitors, being neither plaintiff nor defendant in the district court but court-appointed officers, was not technically a party to the proceedings. *English* v. *Cunningham*, No. 14,983; June 10, 1959, Slip Opinion, at 5 n.9. Undoubtedly the reason for this statement was that all orders in the case are entered as a part of the original docket in the district court and all orders entered bear the title of the original case, *i.e.*, *Cunningham* v. *English*, Civil Action No. 2361-57.

to afford an opportunity "for the parties *and the Monitors* to agree if possible upon a form of judgment which is consistent with our opinion."[5] Subsequently, after noting that "the plaintiffs, the defendants, *and the Monitors*" had "agreed upon a form of proposed judgment . . ."[6] the judgment was entered. When defendants sought a stay of the Court of Appeals' judgment in this Court, the Board of Monitors filed oppositions thereto and participated in oral argument before Mr. Justice Frankfurter.[7]

Having participated below in the two appeals and in the application for stay in this Court, the Board of Monitors should be permitted to participate further in this Court in the instant proceeding which arises from the February 9 order of the district court.

CONCLUSION

The determination of who is or is not a party in this Court should not and does not depend upon the discretion, election or tactical consideration of the filing party seeking review. See *National Hells Canyon Association, Inc.* v. *Federal Power Commission*, No. 773, October Term, 1956, Order of March 4, 1957. Thus, petitioner should not be permitted to foreclose participation by the Board of Monitors by the simple device of omitting the Board of Monitors from the caption of the case.

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[5] *English* v. *Cunningham*, No. 14,983, June 10, 1959, Slip Opinion, p. 28. (emphasis added)

[6] *English* v. *Cunningham*, No. 14,983, July 9, 1959, Supplemental Opinion, p. 1. (emphasis added)

[7] See *English* v. *Cunningham*, Printed Order by Justice Frankfurter, August 4, 1959.

The record of events confirms the fact that the Board of Monitors is a proper party respondent in this Court.

Underlying the instant proceeding is the order of the district court, responsive to a petition initiated and prosecuted in that court by the Board of Monitors. After full participation by the Board as appellee the order of the district court was substantially affirmed by the Court of Appeals in the judgment for which review is here sought.

Only by allowing the Board to participate as a party respondent before this Court will this Court receive the views of all parties who have participated since the inception of this phase of the litigation. This is especially desirable in the instant proceeding since both petitioner and respondents English, et al., have always consistently opposed the order of February 9, which generated the present litigation.

WHEREFORE, the Court is requested to enter an order granting leave for the Board of Monitors to file the attached Brief in Opposition to Petition for Certiorari and correcting or amending the title of this case so as to designate or confirm the Board of Monitors as a party respondent therein, with permission to participate as such, and the Court is further requested to grant the Board of Monitors such other and different relief as may be just and equitable in the premises.

Respectfully submitted,

MARTIN F. O'DONOGHUE,
Chairman of the Board of Monitors

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 383

JOHN CUNNINGHAM, *Petitioner*

vs.

JOHN F. ENGLISH, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BOARD OF MONITORS IN OPPOSITION

This proceeding involves Cunningham's collateral attempt to repudiate his agreement to the entry of an interim Consent Order in an action which he and twelve other Teamster members initiated to protect the rights of rank and file members of the International Brotherhood of Teamsters. Approved by Cunningham and the other parties after twenty-two days of trial, the Consent Order provided for a court-appointed Board of Monitors to make provisional recommendations directed to the elimination of specified financial abuses and the ultimate assurance of a

fair and honest election. Now disaffiliated from the original plaintiffs,[1] Cunningham seeks to assert the rights of third parties in order to invalidate the Consent Order to which he himself subscribed.

Questions Presented

On February 9, 1959 the trial court assigned specially to this class action since 1957 issued an Order interpreting the provisional Consent Order entered January 31, 1958 (J.A. 280).[2] The Court of Appeals affirmed the Order of Construction in all major respects, and unanimously rejected Cunningham's argument that the earlier Order to which he had consented was a nullity which could not legally support an interpretative Order because of the failure to provide formal notice under Rule 23(*c*) of the Federal Rules of Civil Procedure to the members of the class formerly represented by petitioner in the proceeding. As had the trial court, the Court of Appeals held that Rule 23(*c*) did not apply because the Consent Order was not an "ultimate disposition" of the proceeding but rather embodied a "plan" under the terms of which the defendants would establish proper financial and election procedures under the supervision of the Board of Monitors and the trial court prior to the holding of a democratic union convention (Pet. 3a). In holding Rule 23(*c*) inapplicable to this interim Order, the

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[1] Cf. Cunningham's testimony that Provisional General President Hoffa had indirectly paid some of his expenses. *Hearings Before the Senate Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 2d Sess. pt. 43, at pp. 16123-78 (1958).

[2] References are to the pages of the joint appendix in the Court of Appeals.

Court of Appeals rejected Cunningham's solitary attempt to terminate judicially enforced efforts under the Consent Order to affirm the rights of rank and file members of the International Brotherhood of Teamsters.

Accordingly, the questions presented concern (1) whether a signatory to a Consent Order may collaterally attack the Order one year later for lack of formal notice to third parties, and (2) whether the unique Consent Order at bar was provisional in operation and hence not subject to the requirement of Federal Rule 23(*e*) that certain class actions may not be finally "compromised" without prior notice to all members of the class not before the court.

Statement of the Case

The original complaint in this case was filed in September, 1957 by Cunningham and twelve other plaintiffs on behalf of all Teamster members. The plaintiffs alleged that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and certain of its officers were violating members' rights, by, *inter alia*, conspiring to "rig" the selection of delegates to a forthcoming union convention for the purpose of electing defendant James R. Hoffa as General President and defendant Dave Beck as General President Emeritus (J.A. 1). The complaint detailed numerous violations of the International constitution and charged the defendants with such other malfeasances as raids on union treasuries, refusals of financial accounting, the maintenance of inadequate financial records and the misuse of union funds. The jurisdiction of the federal district court was invoked by Cunningham and the other plaintiffs to enjoin such

abuses and to prevent the defendants from conducting the convention or electing any national officer unless those delegates voting were honestly selected in accordance with the union constitution. In addition, the plaintiffs requested the appointment of "a receiver or board of receivers, a master in equity or masters in equity" authorized, *inter alia*, to establish sound and democratic election procedures and to return the management of the Teamsters to officers duly elected at a convention "convened pursuant to the Order of this Court" (J.A. 27).

Unsuccessful in their efforts to enjoin the Teamster convention, Cunningham and the other parties to the proceeding entered into a widely-publicized interim Consent Order, approved by the district court after three weeks of trial on January 31, 1958 (J.A. 58).[3] Under the provisions of the Consent Order the officers elected at the challenged convention undertook to fulfill certain specified obligations in return for being permitted to assume office "provisionally." The obligations imposed by the Consent Order looking toward a clean and honest election include the protection of members' constitutional rights, establishment of sound financial procedures, adherence to recognized fiduciary standards in the handling of union funds, and prohibition of conflict of interest on the part of Teamster officers. To aid in the fulfillment of these obligations, the interim Consent Order authorized the creation of a Board of Monitors to make preliminary recommendations to the defendants which might be enforced only

[3] As Cunningham properly notes, full notice of the terms of this Order was provided rank and file Teamster members by publication in "The International Teamster" (Pet. 12).

by final court order.[4] Under the provisions of the interlocutory Consent Order, the defendants would secure a final disposition of the proceeding by order of the district court authorizing the holding of a union convention.

To prevent obstruction with the objectives of the Consent Order,[5] the Board of Monitors secured from the district court on February 9, 1959 an Order of Construction clarifying the powers of the Board of Monitors and the provisions of the Consent Order pertaining to the holding of a new union convention (J.A. 280).

Although appealing from the Order of Construction, Cunningham disputed not this interpretative Order but rather the validity of the basic Consent Order to which he was signatory. Notwithstanding his full participation in the earlier proceeding, Cunningham contended that the failure to comply with the formal notice provisions of Rule 23(*c*) with respect to others invalidated the Consent Order which he himself had signed.[6]

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[4] Thus the Court below interpreted the provisional Consent Order as directing the court-appointed Board of Monitors to "make recommendations . . . in areas where the defendants have substantive obligations under the consent decree . . . If . . . defendants fail to comply in any significant respect with their obligations . . . the Monitors may so report to the court . . . The Court itself, after due opportunity for defendants to be heard, may issue orders within the scope of the consent decree." *English* v. *Cunningham*, No. 14,983, at 8-9 (D.C. Cir. June 10, 1959).

[5] In a Memorandum Opinion of December 11, 1958 the trial court concluded that defendants had not demonstrated "good faith compliance with the reasonable and pertinent orders of recommendation issued by the Monitors" (J.A. 168).

[6] Fed. R. Civ. P. 23:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the

However, the Court of Appeals rejected Cunningham's vicarious reliance on Rule 23(e) and unanimously affirmed the lower court's ruling that the Rule could not be invoked in this particular context to invalidate a Consent Order to which Cunningham was a party. The Court approved the trial court's characterization of the Consent Order as "interlocutory in nature" rather than a "final settlement" within the contemplation of Rule 23(e) (Pet. 3a). As such, the "ultimate disposition of the litigation" would result only after "a large measure of future conduct by the parties" (Pet. 3a). Furthermore, the continued and detailed supervision of the district court over the proceeding, aided by the recommendations of an impartial Board of Monitors, necessarily precluded that conclusive "sell out" by plaintiffs in a class action which Rule 23(e) was designed to prevent (Pet. 3a). Most importantly, inasmuch as neither Cunningham nor anyone else was prevented from having his day in court, the facts before the Court of Appeals demonstrated conclusively that the Rule was inapplicable (Pet. 4).

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court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

* * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

ARGUMENT

Ostensibly seeking review of the Order of Construction, Cunningham in fact is utilizing this proceeding to dispute the validity of the underlying Consent Order.[7] However, Cunningham cannot rely on the alleged lack of formal notice to third parties under Rule 23(*e*) to invalidate by collateral attack a Consent Order to which he himself was signatory. Even if the applicability of Rule 23(*e*) were more than a hypothetical issue presented by an actual signatory of the Order, the Court of Appeals properly interpreted Rule 23(*e*) as inapplicable to the provisional Consent Order entered in this proceeding.

I. *Petitioner Cannot Assert The Rights Of Notice Of Third Parties In Order To Invalidate By Collateral Attack A Consent Order To Which He Himself Was Signatory.*

Cunningham is clearly barred from asserting the rights of third parties under Rule 23(*e*) in order to invalidate the Consent Order. As Cunningham is compelled to admit, Rule 23(*e*) was "designed to protect members of a class who are not actually before

[7] Despite his indiscriminate and confusing references to both "judgments" or "these two consent orders" (Pet. 8), Cunningham defines for the consideration of this Court no issues pertinent to the Order of Construction other than the validity of the underlying Consent Order. In fact, petitioner endorses the conclusion of the Court below that his challenge of the trial court's Order of February 9, 1959 is based "primarily on the ground that the Consent Decree of January 31, 1958, upon which the later decree rests, is void" (Pet. 7). Cunningham's attempt to raise a procedural due process issue can be intelligible only with reference to the entry of the Consent Order, since no procedural deficiencies are or could be charged to the entry below of the Order of Construction.

the court against unjust and unfair settlements" (Pet. 11). Since Cunningham was an active participant in the proceeding, he obviously was not affected by the failure to provide formal notice under Rule 23(e) to other members of the class whom he was presumably representing. Thus Cunningham's request for review disregards this Court's insistence that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943). Not within the class of persons affected by any procedural defect in the entry of the Consent Order, Cunningham cannot repudiate his own consent by gratuitous claims under Rule 23(e) or the Fifth Amendment on behalf of third parties. *Tileston* v. *Ullman*, 318 U.S. 44 (1943); *United States* v. *Ansani*, 240 F. 2d 216 (7th Cir. 1957), *cert. denied*, 353 U.S. 936 (1957).

Furthermore, the fact that Cunningham was a party to the Consent Order would have precluded him from contesting it even on direct appeal.[8] For Cunningham does not and cannot demonstrate any "lack of actual consent to the decree as entered . . . or of fraud in its procurement . . . or . . . lack of federal jurisdiction . . ." which would permit a reviewing court to invalidate a decree entered with the consent of the parties. *Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928); *Pacific R.R.* v. *Ketchum*, 101 U.S. 289 (1880). Even assuming he could assert rights under Rule 23(e), Cunningham cannot now impeach the jurisdiction of the lower court over the parties and the general subject matter.[8] *Walling* v. *Miller*, 138 F. 2d 629 (8th Cir.

[8] Cunningham's contentions that the court below did not have jurisdiction to enter the Consent Order are incompatible with his invocation of the jurisdiction of the court as one of the original

1943), *cert. denied*, 321 U.S. 784 (1944). Moreover, the Consent Order clearly dealt with matters within the jurisdiction of the court about which the parties might agree.[9] To permit a signatory party to a Consent Order to welsh on his bargain because it belatedly appears to have been a "mistake" (Pet. 8) would be to allow a party to "voluntarily submit himself to a judgment of a court one day and flout it with impunity the next when its application proves more distasteful than he had anticipated." *NLRB* v. *Retail Clerks Ass'n*, 203 F. 2d 165, 169 (9th Cir. 1953), *implemented in*, 211 F. 2d 759 (9th Cir. 1954), *cert. denied*, 348 U.S. 839 (1954).

Cunningham certainly may not belabor his contentions disputing the Consent Order more than one year after its entry in a separate proceeding where the only issue is the validity of the Order of Construction. Tolerance of petitioner's ruse would violate the firm policy of this Court prohibiting collateral attacks on judgments where the parties had prior opportunity

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plaintiffs, and his subsequent reliance on the Consent Order to regain his membership in Teamster Local 584. Cf. *Hoxsey* v. *Hoffpauir*, 180 F. 2d 84 (5th Cir. 1950), *cert. denied*, 339 U.S. 953 (1950); *Miller* v. *Purites Co.*, 71 F. 2d 804 (4th Cir. 1934), *cert. denied*, 293 U.S. 604 (1934).

[9] Presumably, Cunningham's undocumented assertions that the "two judgments" are "dangerous precedents" which threaten "chaos" and "confusion" and propel courts into a "wilderness of litigation" challenge the scope and subject matter of the Consent Order (Pet. 8, 14). Not only do these allegations ignore the pertinent precedents of this Court, but also petitioner himself has recognized that when "the party affected [by a judgment] is himself before the court [he] has the full opportunity to protect his own interests" (Pet. 12). Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 401 (June 22, 1959).

to litigate jurisdictional and other issues.[10] *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376-78 (1940); cf. *Sherrer* v. *Sherrer*, 334 U.S. 343, 348-50 (1948). In any event, Cunningham's efforts to nullify the Consent Order on appeal from the Order of Construction come belatedly more than twelve months after its entry with no showing of such "extraordinary circumstances" as would justify this inexcusable delay. *Avedis Zildjian Co.* v. *Fred Gretsch Mfg. Co.*, 251 F. 2d 530, 532 (2d Cir. 1958); *Societe Fonceire Et Agricole Des Etats Unis* v. *Milliken*, 135 U.S. 304 (1890).

In short, Cunningham relies on the rights of third parties in order to wage that attack on the underlying Consent Order denied him by his prior consent and subsequent delay. The Court of Appeals properly foreclosed Cunningham's efforts to nullify the Consent Order and force the parties to regress to their status prior to January 31, 1958.

II. *The Decision Below Correctly Holds Rule 23(c) Inapplicable To A Provisional Consent Order Where There Has Been No Final Disposition Of The Proceeding.*

Apart from Cunningham's inability to assert the rights of strangers in order to repudiate a Consent Order which he himself signed, the Court of Appeals

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[10] The lower court's determination sustaining its own jurisdiction to enter the Consent Order is clearly not subject to collateral attack. *Hardy* v. *Bankers Life & Cas. Co.*, 232 F. 2d 205, 209 (7th Cir. 1956), *cert. denied*, 351 U.S. 984 (1956). Moreover, Cunningham's arguments inevitably fall short in this collateral challenge to the Consent Order where the "scope of the enquiry may be even narrower" than that which is tolerated on direct review. *Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928).

in any event held that the formal notice provisions of Rule 23(e) never came into play.

In view of the fact that the Consent Order permitted the defendants to assume office only "provisionally" and authorized the lower court to enforce the obligations specified in the Consent Order, the trial court and the Court of Appeals properly ruled that this Order was not a "final "dismissal or compromise" within the scope of Rule 23(e).[11] The fact that the Order requires "a large measure of conduct by the parties, leading toward an ultimate disposition of the litigation by the court" distinguishes this multi-faceted judicial proceeding from the final and conclusive dispositions to which Rule 23(e) applies (Pet. 3a).[12] For

[11] Cunningham's contention (Pet. 8) that Rule 23(e) imposes an inflexible and mandatory procedure applicable to every dismissal or compromise of a class action was rejected more than eighteen years ago. See *May* v. *Midwest Ref. Co.*, 121 F. 2d 431 (1st Cir. 1941), *cert. denied*, 314 U.S. 668 (1941); *Giesicke* v. *Pittsburgh Hotels, Inc.*, 82 F. Supp. 64 (W.D. Pa. 1949). Nor can Cunningham document his contentions that an order entered without adequate notice under Rule 23(e) "is illegal and void ab initio" and "has no legal effect, binding force, or efficacy for any purpose" (Pet. 13). Cunningham can hardly analogize the instant case to those he cites which invalidate the unauthorized entering of a conclusive default judgment against a party who had no notice because of the withdrawal of his attorney from the proceeding (Pet. 12). Cf. *Prichard* v. *Nelson*, 137 F. 2d 312 (4th Cir. 1943); *Phelan* v. *Bradbury Bldg. Corp.*, 7 F.R.D. 429 (S.D.N.Y. 1947).

[12] Cunningham can bridge the factual gulf between this Consent Order and the typical "sell out" neither by selected extemporaneous comments nor by his random definitional forays (Pet. 3-4, 9). In arguing that the use of the word "settlement" by the court and plaintiffs' counsel compels the application of Rule 23(e), Cunningham relies on the dictionary definition of "compromise." However, petitioner's own authority significantly prefaces the definition of "settle" as follows: "A word of equivocal meaning:

Rule 23(c) is designed to prevent collusive dismissals or compromises which bar other members of the class from asserting their cause of action. See 3 Moore, Federal Practice, par. 23.24, at 3549 (2d ed. 1948). Where the members of the class are not precluded by the dismissal or compromise from judicial redress, the notice provisions of Rule 23(c) are inapplicable. *Webster Eisenlohr* v. *Kalodner*, 145 F. 2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945); *Malcolm* v. *Cities Service Co.*, 2 F.R.D. 405 (D. Del. 1942). In noting that "[t]he litigation continues" and that the entry of the Consent Order appeared to have barred no member of the class with a valid cause of action "from access to the court" (Pet. 4a), the decision below therefore squared with both the express provisions of Rule 23(c) and the decisional precedents.[13]

Concerned solely with the applicability of Rule 23(c) to this proceeding, the opinion of the Court of Appeals prompts no decisional conflict or doctrinal innovation warranting review by the Supreme Court. For Rule 23(c) has never been applied so as to permit

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meaning different things in different connections, and the particular sense in which it is used may be explained by the context or the surrounding circumstances." Black, Law Dictionary 1538 (4th ed. 1951).

Petitioner's ventures into lexicography ignore the repeated admonitions of this Court that statutes "are not inert exercises in literary compositions" to be construed apart from their background and purpose. *United States* v. *Shirey*, 359 U.S. 255, 260 (April 20, 1959).

[13] Contrary to Cunningham's assertions (Pet. 11-12), the extensive publicity given the Consent Order as well as the actual notice received by members of the International Brotherhood confirm the conclusion below that no member of the class has been denied his day in court.

an actual litigant to invalidate a final compromise or dismissal of a class action by alleging that the absent members of the class were prejudiced by the lack of notice under Rule 23(e). The Court of Appeals justifiably refused to give Rule 23(e) "an application inconsistent with its purpose" (Pet. 4a) at the request of a signatory to a provisional Consent Order relying on Rule 23(e) solely to welsh on his prior bargain.

CONCLUSION

The Court of Appeals properly refused to permit a signatory to a Consent Order to vitiate its provisions by asserting the rights of third parties. Accordingly, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1958

No. 383

JOHN CUNNINGHAM, *Petitioner*

v.

JOHN F. ENGLISH et al, *Respondents*

PETITION FOR REHEARING

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October Term 1958

No. 383

JOHN CUNNINGHAM, *Petitioner*

v.

JOHN F. ENGLISH et al, *Respondents*

PETITION FOR REHEARING

Since the issues in this case were presented to this Court and the lower courts, Congress has passed the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-857, which Act specifically deals with the evils and abuses which generated and formed the basis for these proceedings in the trial court for equitable relief. The aforementioned Act is now in full force and effect (Act became effective November 14, 1959), and preempts the courts from proceeding further in this equity proceeding because the Congress by the aforesaid Act has provided a plain, adequate and complete remedy at law for any and all equitable

relief which this petitioner-plaintiff and his co-plaintiffs sought in the trial court.

The relief which this petitioner-plaintiff and his co-plaintiffs sought in the trial court is set forth in the "Statement of Case" in the Petition for a writ of certiorari filed herein (Page 2). The relief sought, all equitable, was embodied in a Consent Order entered in the United States District Court for the District of Columbia on February 9, 1959 (J. App. 280). A comparison of the Amended Complaint (J.A. 1) and the Consent Order with the provisions of the Labor-Management Reporting and Disclosure Act of 1959 will disclose that the Congress legislated with respect to all of the provisions embraced in the Amended Complaint and the Consent Order.

The legislative history of the Labor-Management Reporting and Disclosure Act of 1959 clearly shows that the Congress had these issues specifically in mind as it conducted extensive investigations dealing with the specific evils and abuses upon which this proceeding in equity was grounded in the trial court.

The House passed H.R. 8342 with the language of H.R. 8400 and substituted the text of H.R. 8400 in S. 1555, the final bill number. The Senate Report is No. 187 dated April 14, 1959 (to accompany S. 1555); House Report No. 741 dated July 30, 1959 (to accompany H.R. 8342) and Conference Report No. 1147 dated September 3, 1959 (to accompany S. 1555). A mere reading of the preamble of those reports will suffice to show that the Congress dealt with, and provided the remedies and procedures for, all of the issues presented in this case as embodied in the aforesaid Consent Order. A reference to the Act itself

will show that Title I thereof is headed "Bill of Rights of Members of Labor Organizations"; Title II, "Reporting by Labor Organizations, Officers and Employees of Labor Organizations, and Employers"; Title III, "Trusteeships"; Title IV, "Elections"; Title V, "Safeguards for Labor Organizations" and there are Titles VI and VII to said Act also, but they do not touch the issues in this proceeding.

A justice of this Court in *English* v. *Cunningham*, 4 L. Ed. 2d, 42 (1959) stated:

> "As is recognized by all concerned, judicial supervision of a union with a membership of 1,500,000, and some 800 locals through the agency of a mechanism like the Board of Monitors is an unusual manifestation of equity powers."

The relief which this petitioner-plaintiff and his co-plaintiffs sought from the trial court invoked solely the equity jurisdiction of that court and all of the relief in the cause is based upon equity jurisdiction. It is elementary that equity jurisdiction can not be sustained where there is a plain, adequate, and complete remedy at law.

CONCLUSION

Since the Labor-Management Reporting and Disclosure Act of 1959, supra, has now become law, it preempts the equity powers of the Court in this case because the Act provides a plain, adequate and complete remedy at law for all of the issues in this case.

Petitioner avers that this petition for rehearing should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Dated: December 31, 1959

CERTIFICATE

I hereby certify that the foregoing Petition is presented in good faith and not for purposes of delay, and is restricted to grounds specified by Rule 58 of the Rules of this Court.

December 31, 1959.

J. BENJAMIN SIMMONS
Attorney for Petitioner